Duncan Foundry and Machine Works, Inc. ***and*** **United Steelworkers of America, AFL-CIO.** Case 14-CA-4608

May 29, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On December 2, 1968, Trial Examiner James F. Foley issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The Charging Party filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.

We agree with the Trial Examiner that, when Respondent paid vacation pay in early August 1967, at the time it partially shut down its plant for 2 weeks for maintenance and repair, to employees who continued to work and to the employees who did not work, and similarly paid strikers who returned after the August shutdown, but denied such payments to unreplaced economic strikers, it unlawfully discriminated against the latter strikers under the Act. We also agree with the conclusions of the Trial Examiner that the Respondent discriminated against the 40 strikers who were recalled to their former jobs in March or April 1968, without restoring them to their seniority and other job rights to which they were entitled prior to the strike which began on January 29,1967. However, we base our findings and conclusions upon the considerations discussed below.

The denial of vacation pay: The Respondent, which is engaged in the manufacture of steel castings and patterns, employed approximately 350 production and maintenance employees and approximately 30 machine shop employees prior to January 29, 1967. From 1942 until the summer of 1966, Respondent recognized and bargained with Employees Association as the collective-bargaining representatives of its employees. Successive contracts were negotiated, the most recent of which was effective from May 18, 1963, through May 18, 1966. The 1963 to 1966 contract contained provisions which provided, *inter alia,* for the payment of vacation benefits based upon length of service to employees who worked continuously during the preceding year, who received earnings in at least 60 percent of the pay periods preceding May 1 of the year of payment, and who were employees on May 1 of the payment year. These vacation provisions were similar to the Respondent's vacation pay practices which had been in effect since the 1950's.

The Charging Party, the United Steelworkers of America, AFL-CIO, filed a timely representation petition on February 21, 1966 (Case 14-RC-5356), and pursuant to a Board conducted election was certified as the collective-bargaining representative of Respondent's employees on July 19, 1966. Beginning October 4, 1966, Respondent and the Steelworkers engaged in bargaining sessions in an attempt to reach an agreement. On January 29, 1967, the Steelworkers engaged in an economic strike. Bargaining continued during the strike, but concluded on September 11, 1967, when the Employees Association filed a petition for representation (Case 14-RC-5787). Among the provisions on which the parties reached an impasse after approximately 35 bargaining sessions were those involving the payment of vacation benefits to strikers. On January 31, 1968, the strike ended and the Steelworkers on behalf of the strikers offered unconditionally their return to work.

At the onset of the strike, about 106 employees remained at work, and approximately 244 employees participated in the strike. Approximately 44 employees returned to work before the strike ended. No new employees were hired to replace the strikers who did not return.

Respondent closed down during the first 2 weeks in August 1967 for its annual maintenance and repair work. Approximately 55 employees worked during this period, and approximately 100 employees did not work. All of these nonstriking employees were paid a minimum of 2 weeks pay during the shutdown, and those who worked received their regular wages. Employees who under the provisions of the expired contract between the Employees Association and the Respondent accrued more than 2 weeks vacation were paid the additional amounts. Strikers who returned to work after the August shutdown, but before September 11, 1967, the date the Association's petition was filed, also received a minimum of 2 weeks pay and the additional amounts to which they would be entitled under the vacation provisions of the expired contract, if any. None of the other striking employees was paid vacation benefits.

The Respondent contends that it was not obligated to pay the striking employees who had not returned to work vacation benefits since: (1) the

Association's contract had expired, and the vacation provisions were not applicable; (2) the striking employees did not in any event qualify under the provisions of the expired collective-bargaining contract since they were not working on May 1 of the calendar year in which benefits accrued because of their strike status. We find no merit in the Respondent's contentions.[1]

Although the contract with the Association had expired, it is clear that the Respondent applied the terms of the contract, as well as past practices, to nonstrikers and employees who returned to work, but withheld such benefits from the unreplaced strikers who might otherwise have qualified. We find that on May 1, 1967, the qualifying date on which benefits were computed, the strikers maintained their employee status. The Board and the Courts have held an economic striker who has not been replaced not only remains an employee under Section 2(3) of the Act, but in regard to accrued vacation benefits must be treated in the same fashion as other employees.[2] Moreover, under the terms of the expired contract which was used as a basis for computing the vacation payments physical attendance on the payroll was not required, but only that the individuals involved remain, as here, in an employee status.[3]

The record indicates that many of the strikers earned accrued vacation pay based upon time worked between May 1, 1966, to January 29, 1967, the date of the strike. Accordingly, we hold that the act of paying accrued vacation benefits to one group of employees while withholding the benefits from another group of employees who are distinguishable only by participation in protected concerted activity, absent a legitimate or substantial business justification, was discrimination in its simplest form, and was destructive of important employee rights,[4] and the Respondent thereby violated Section 8(a)(1) and (3) of the Act. As provided below, the Respondent will be required to pay each employee the vacation pay so withheld. Interest on the amount due each employee shall bear interest at 6 percent from the date the Respondent in effect denied vacation pay to the strikers in its memorandum to them on September 21, 1967, in response to their inquiries, both oral and written, in August and September 1967, as to whether accrued vacations would be paid to strikers.[5]

The denial of seniority rights to strikers: In March or April 1968, the Respondent recalled approximately 40 former strikers allegedly as temporary employees to fill orders occasioned by a customer's inventory error. The Respondent contends that, as the 40 employees in question were recalled on a temporary basis only for the purpose of completing a specific job, they were the same as new employees without seniority rights. The Respondent further contends that they, therefore, had no right to displace returning strikers who were recalled for permanent jobs and nonstrikers who had not left their previous jobs or who were transferred prior to the termination of the strike to other jobs on a permanent basis. While we agree with the Trial Examiner that the Respondent's giving special status to the recalled strikers was discriminatory, we do not, for the reasons discussed below, agree with the contentions of the Respondent or the findings of the Trial Examiner that such employees were temporary employees.

The record shows that the 40 former strikers who were recalled returned to their old jobs and were assigned to perform the same work they had previously performed prior to the strike. The Respondent admittedly had hired no permanent replacements for their jobs. Except for the retention of seniority rights; they received all prior rights and privileges including their old rates of pay. Both President Duncan and Personnel Director Green testified that the employees in question were recalled on a temporary basis, for a temporary emergency, and were considered temporary. However, both further testified that other than being told that they were being called in as temporary employees, nothing specific regarding their job status was said to them. Duncan further stated that he did not know who would stay on permanently and who would not, and did not know "how long the situation would exist." On June 5, 1968, the Respondent sent a notice to all employees, which stated that the Respondent had caught up with the temporary increase in demand and for the next week or two the foundry would operate on a 4-day rather than a 5-day schedule, and would make the necessary adjustments to its working force by decreasing the number of temporary employees. The notice also indicated that the 40 employees recalled in March and April were temporary and had been recalled on

[1] In agreement with the Trial Examiner, we similarly find no merit in the Respondent's contention that the recalled strikers were no longer employees by reason of its decision in September 1967 that their services would not be needed in the future because of the loss of orders resulting from unstable labor conditions. As the Supreme Court recognized in *Fleetwood Trailers Co.*, 389 U.S. 375, frequently a strike affects the level of production and the number of jobs, but such reduction in the size of the labor force due to a strike does not terminate the rights of strikers as employees. See also *Laidlaw Corp.*, 171 NLRB No. 175. Moreover, the Respondent did not present substantial evidence that its major account would not resume reliance on Respondent as a prime supplier as soon as the so-called labor problem was resolved. Nor did Respondent present evidence of any change in its productive capacity, or any decision to subcontract production it engaged in prior to the strike, or any other factor relating to its operation that would disclose lower production for the 2-year period following the strike or thereafter.

[2] See *Star Expansion Industries Corp.*, 164 NLRB No. 95; *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26. See also *N.L.R.B.* v. *Frick Co.*, 397 F.2d 956 (C.A. 3).

[3] See art. XI, secs. E and H.

[4] *N.L.R.B* v. *Great Dane Trailers, Inc., supra.*

[5] The Steelworkers filed and served the charge in the instant case on March 20, 1968. Thus, the statute of limitation or Sec. 10(b) period ended on September 20, 1967. See Sec. 10(b) of the Act, and Secs. 102.111, 102.112, 102 113, and 102 114 of the Board's Rules and Regulations. The Remedy and the Recommended Order of the Trial Examiner Decision are modified below in conformity with this finding.

a temporary basis to meet an increase in demand.

Respondent kept a list of employees identified as permanent employees, and a list of employees identified as temporary employees. On the first list were the names of the nonstrikers, those who abandoned the strike before its termination, and two employees who had been recalled as permanent employees. On the second list were the names of the strikers who were on strike the entire period of the strike, and who had been recalled in March and April 1968. However, the record shows that the recalled strikers participated in the work week reductions the same as other employees, and even though the customer's inventory error had apparently been satisfied the recalled strikers continued to work. As of the date of the hearing, the end of June 1968, it appears the recalled strikers were working on the same basis as other employees. Thus, we conclude that there was no substantial business justification for the Respondent's special treatment of the recalled unreplaced economic strikers.

In the circumstances, we find that the recalled strikers were not employed on a temporary basis, but were recalled for an indefinite, indeterminate period, and had a reasonable expectancy of continued employment, and cannot, therefore, be equated to new employees.[6] As regular employees they were entitled to all the rights and privileges they had accumulated prior to the time they went out on strike. Consequently, the Respondent's creating a dichotomy between the 40 recalled former strikers and its other employees and its notice that the recalled former strikers would be laid off first in the event of a reduction in force in effect granted superseniority to nonstrikers. Such conduct was destructive of the employees' Section 7 rights which necessarily caused discouragement of membership in the Steelworkers.[7] For these reasons, we find that the Respondent discriminated against the recalled former strikers in violation of Section 8(a)(1) and (3). Accordingly, we shall order that the Respondent give to the 40 employees recalled in March or April 1968 as temporary employees seniority rights and privileges effective the first day they began work upon recall.

THE REMEDY

Like the Trial Examiner we have found that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily withholding from employees on strike through January 31, 1968, or employees who had terminated striking but had not returned to work by September 13, 1967, vacation pay for 1967. Accordingly, we shall order that the Respondent pay to each of the employees involved the amounts due as provided by the Trial Examiner under the section of his Decision entitled "The Remedy." However, the amount due each employee shall bear interest at 6 percent from September 21, 1967, rather than from the period set forth by the Trial Examiner.

Apart from the foregoing, we shall adopt the remedy set forth in the Trial Examiner's Decision.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Duncan Foundry and Machine Works, Inc., Alton, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following modifications.

Paragraph 1(B)(1) of the Trial Examiner's Recommended Order is deleted and the following substituted:

1. Pay to each of the striking employees who remained on strike from January 29, 1967, to January 31, 1968, or who returned to work prior to January 31, 1968, but not before September 13, 1967, vacation pay withheld from him, an amount equal to 2 weeks' pay plus any supplemental amount to which he is entitled under the formula used by Respondent to compute the supplemental amounts it paid the employees who received vacation pay for 1967, plus interest from September 21, 1967, until paid.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES F. FOLEY, Trial Examiner: This case, Case 14-CA-4608, was brought before the National Labor Relations Board (herein called the Board), under Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), 61 Stat. 136, 73 Stat. 519, against Duncan Foundry and Machine Works, Inc. (herein called Respondent) by a complaint issued April 24, 1968, and answer filed June 10, 1968. The complaint is premised on a charge filed March 20, 1968, by United Steelworkers of America, AFL-CIO (herein called Steelworkers).

It is alleged in the complaint that on September 20, 1967, and thereafter, Respondent, in violation of Section 8(a)(1) and (3) of the Act, refused to pay accrued vacation pay to employees who engaged in an economic strike from on or about January 1967 to January 31, 1968, but in the calendar year 1967, paid the accrued vacation pay to employees who did not engage in the strike or who abandoned the strike before its termination. It is also alleged in the complaint that since on or about January 31, 1968, Respondent, in violation of Section 8(a)(1) and (3) of the Act, has been denying returning strikers seniority rights and privileges, but at the same time granting them to employees who did not engage in the strike or who abandoned it before its termination.

Respondent, in its answer, denies it committed any unfair labor practice under the Act as alleged in the

[6] Cf. e.g., *Orchard Industries, Inc.*, 118 NLRB 798; *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433.

[7] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221.

complaint. It affirmatively defends that any claim or cause of action alleged in the complaint against it is barred by Section 10(b) of the Act and by the Regional Director's dismissal on September 11, 1967, of the Steelworkers' charge of a refusal to bargain in Case 14-CA-4398, and the final disposition of representation case 14-RC-5187 filed on September 13, 1967, by Employees Association of Duncan Foundry, Inc. (herein called Employees Association) and representation case 14-RM-327 filed on September 14, 1967, by Respondent. Respondent also alleged in its Answer that it has been denied due process in that it has been denied the opportunity to prepare its defense by General Counsel's failure to disclose the names of the persons discriminated against and the circumstances giving rise to Respondent's alleged discrimination against them.[1]

A hearing on the complaint supplemented by the bill of particulars and the answer was held before me in St. Louis, Missouri, on June 10, 11, 17, 18, 19, and 20, 1968. The parties were afforded an opportunity to present evidence, make oral argument and file briefs. Briefs were filed by General Counsel, Respondent and Charging Party after the close of the hearing.

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT COMPANY

Respondent, an Illinois corporation with its principal office and place of business in Alton, Illinois, has at all material times herein been engaged in the manufacture, sale and distribution of steel castings, and stokers, incinerators and related machinery. During the calendar year 1967, Respondent manufactured, sold and distributed at its Alton, Illinois, plant, products valued in excess of $50,000, and of these products those with a value in excess of $50,000 were shipped from the Alton plant directly to points located outside the State of Illinois. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and assumption of jurisdiction will effectuate the purposes of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Steelworkers is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Evidence in Support of Complaint*

Respondent has been engaged in the manufacture of steel castings from patterns placed with it by customers for more than 90 years. The castings are produced in a foundry operation, the mainstay of its business. Prior to January 29, 1967, Respondent employed in the foundry approximately 350 production and maintenance employees.[2] Respondent also has a machine shop operation, which builds stokers, incinerators and related machinery. About 30 employees worked in the machine shop before the January 29 date.

From 1942 until the summer of 1966, Respondent recognized and bargained with Employees Association as the collective-bargaining representative of its employees. Respondent and the Association were parties to successive labor contracts; the most recent of which became effective May 18, 1963 (herein called the Last Contract). Respondent terminated the Last Contract on May 18, 1966. The Steelworkers was certified as collective-bargaining representative of Respondent's employees on July 19, 1966, in 14-RC-5356. The Steelworkers filed the petition for representation on February 21, 1966. From October 4, 1966, through September 13, 1967, Respondent and Steelworkers engaged in 35 or more bargaining sessions. The Steelworkers engaged in an economic strike from January 29, 1967, until January 31, 1968. Negotiations took place during approximately 7 1/2 months of the strike period. They ended on September 13, 1967, approximately 4 1/2 months before the strike ended, because of the filing on September 13, 1967, of a petition for representation by Employees Association.

Employees Association's petition for representation of September 13, 1967 was in case 14-RC-5787. Respondent, on September 14, 1967, filed a petition in 14-RM-327 questioning the status of Steelworkers as a majority representative. An election was held by the Board on January 26, 27, and 28, 1968, in the unit the Steelworkers had represented.[3]

[1] Respondent, by counsel, filed a motion for a bill of particulars on May 6, 1968, in which it asked for the basis for Respondent's obligation to pay vacation pay; the names of striking employees allegedly entitled to accrued vacation pay in 1967 and did not receive it; the names of strikers as of September 20, 1967, who had not lost employment status by acts of violence, voluntary resignation, obtaining other or substantially equivalent employment, and permanent change in nature of Respondent's business which eliminated a substantial number of positions; and the names of employees who received accrued vacation pay in 1967, and the terms and conditions under which it was paid. The motion also requested the names of returning strikers who were denied seniority and privileges, and what seniority rights and privileges were denied each one of these returning strikers; the names of non-striking employees and striking employees who abandoned the strike who received seniority rights and privileges not received by returning striking employees, and what seniority rights and privileges were granted to each one of these employees. On May 28, 1968, Trial Examiner Charles W. Schneider granted the motion for a bill of particulars to the extent that General Counsel was directed to furnish Respondent with a statment of the nature of the seniority and superseniority rights and privileges allegedly denied returning strikers and granted to nonstrikers and strikers who abandoned the strike. He denied the motion for bill of particulars in all other respects. Counsel for Respondent requested the Board for special permission to appeal the Trial Examiner's order denying in part the motion for a bill of particulars. The Board denied the request on June 7, 1968. Counsel for General Counsel, on May 31, 1968, pursuant to Schneider's order of May 28, 1968, furnished to counsel for Respondent a bill of particulars stating therein that "the nature of the seniority rights and privileges and the super-seniority rights and privileges referred to in paragraph 7(c) of the complaint are the right to priority in employment in cases of decreases and restoring of working forces." Counsel for Respondent, on June 6, 1968, filed with Trial Examiner Schneider a motion in which he was requested to require General Counsel to comply with his order of May 28, 1967, on Respondent's motion for a bill of particulars filed May 6, 1968. Respondent, by counsel, contended that General Counsel's bill of particulars was "ambiguous, evasive and non-specific" and did not comply with Trial Examiner Schneider's order. On June 7, 1968, Trial Examiner Schneider denied the motion for compliance. On June 10, 1968, Respondent, by counsel, filed with the Board a request for special permission to appeal to the Board Trial Examiner's denial of the motion for compliance of June 7, 1968. On June 14, 1968, the request for special permission to appeal was denied by the Board.

[2] As described *infra*, Steelworkers initiated a strike of Respondent's employees on January 29, 1967, which lasted until January 31, 1968.

[3] Three hundred and fifty-two votes were cast in the election. One hundred and fifty-five were cast for Respondent, none were cast for Steelworkers, and two votes were cast against participating organizations. One hundred and sixty-six votes were counted. One hundred and eighty-six

At the outset of the strike, which began on January 29, 1967, about 106 employees remained at work and did not strike. Approximately 244 participated in the strike. On February 15, 1967, Respondent sent a memorandum to the striking employees in which it informed them that if they did not return to their jobs by February 22, 1967, they would be permanently replaced. A number of employees returned to work following this memorandum. By the end of the strike on January 31, 1968, there were approximately 150 on Respondent's payroll. Approximately 44 employees returned before the strike ended. No employees were permanently replaced. At the time of the hearing in June 1967, Respondent employed in the foundry 175 to 200 employees identified as permanent employees and in the machine shop 15 employees identified as permanent employees. In addition, it had an additional 40, more or less, employees identified as temporary employees engaged in what Respondent described as temporary work to produce castings intended to increase a customer's inventory that had a deficiency in it due to an error in the customer's inventory records.

Respondent closed down during the first 2 weeks of August 1967 for maintenance and repair. Approximately 50 to 55 employees worked during this 2-week period. Between 80 and 100 employees did not work. Those who did not work were paid their wages for the 2-week period. Those with tenure who, under the formula in article XI of the Last Contract, were entitled to a paid vacation greater than 2 weeks received a sum in addition to the 2 weeks wages that was equivalent to the wages for the additional vacation period beyond the 2 weeks to which they were entitled under the formula. Those who worked received their wages for the 2 weeks and in addition received a sum comprised of the amount of the 2 weeks' wages plus what additional amount they were entitled to receive under the formula for a period beyond the 2 weeks. Strikers who returned after the first 2 weeks in August 1967, but before September 11, 1967, the date Employees Association's petition was filed, received 2 weeks' pay and the additional amount in excess of the 2 weeks' pay to which they would be entitled under article XI of the Last Contract, if any.[4]

The above evidence discloses that employees who did not work during the shutdown who had tenure of less than a year and not entitled to a vacation, or tenure of 1 to 3 years and entitled to only a week's vacation, or tenure of 3 to 5 years and entitled to only a week and a half vacation, were paid 2 weeks' wages for not working the 2 weeks. Employees with 5 to 15 years' tenure and entitled to 2 weeks' paid vacation under the formula in the Last Contract, received 2 weeks' wages for the 2 weeks not worked as did the employees with less seniority.

During August 1967, following the plant shutdown in the first 2 weeks of August, and in September 1967, striking employees, by letter and orally, asked Respondent for vacation pay for 1967.[5] Steelworkers had suggested to the striking employees that they make this request. On September 21, 1967, E. J. Green, Respondent's personnel director, sent a letter to each striking employee in which he referred to the request for vacation pay, and stated that Respondent "is presently making a study of the vacation eligibility as it applies to those who have already made requests for vacation pay as well as those who have not done so," and "as soon as the study is completed and a determination is made, you will be informed of our decision." The striking employees were not informed of the results of any study of this problem, and were not paid vacation pay for 1967.[6]

In a letter to Respondent dated February 8, 1968, Steelworkers referred to Personnel Director's letter of September 21, 1967, in which he stated that Respondent was making a study of the eligibility of striking employees for vacation pay in 1967, and then would determine if they were entitled to it. Steelworkers remarked that

votes were challenged by Respondent and Employees Association. The number of challenged ballots were sufficient to affect the results of the election. Timely objections were filed by Respondent (the employer petitioner) and Employees Association (the petitioner union). On June 6, 1968, the Regional Director sustained the challenges to six votes, and overruled the objections. Respondent had challenged the votes of the strikers who were on strike when the election took place on the ground they were no longer employees. There were 178. Employees Association challenged the votes of 25 employees who voted on January 28, the last day of the election. Employees Association and Respondent requested review of the Regional Director's decision of June 6, 1968. On October 11, 1968, the Board denied the request for review. The Regional Director's order of June 6, 1968 ordered the challenged ballots to be opened. This action was deferred by the request for review. The opening of the challenged ballots is now the pending action in cases 14-RC-5787 and 14-RM-387 in view of the Board's denial of request for review of October 11, 1968. I hereby take official notice of the records in these two representation cases.

[4]Article XI of the Last Contract, which was terminated by Respondent effective May 18, 1966, provided the following: An employee was entitled to a paid vacation, if he was in continuous full-time service for a period not less than 12 months prior to May 1 in a calendar year, and worked in at least 60 percent of the pay periods in the 12 months preceding this May 1. The number of days in the paid vacation period of an employee depended on his tenure of continuous employment. For tenure of 1 to 3 years, it was 1 week; of 3 to 5 years, 1-1/2 weeks; of 5 to 15 years, 2 weeks; of 15 years to 25 years, 3 weeks; and of not less than 25 years, 4 weeks. Employees could schedule payment of vacation money between the first pay period after May 1 and the last pay day in the calendar year ending December 31, with 1 week's notice to Respondent's payroll department, and were required to schedule vacations between May 1 and December 1, but the final allotment of time rested with Respondent. Any employee hired prior to October 1 was considered to have been employed on May 1 upon completing his anniversary date of employment, for the purpose of computing the number of years of continuous service. An employee with a break in continuous service but subsequently reemployed was a new employee, except that an employee who secured a leave of absence from Respondent or was on lay off status would not lose his previous accrued continuous service credit. Employees in the Armed Forces and eligible for Veterans Reemployment Rights, upon reemployment by Respondent received credit for continuous service for the time spent in the Armed Forces, but were not entitled to a vacation with pay while serving in the Armed Forces. Any dispute involving interpretation of Respondent's records in respect to eligibility for vacations, including cases involving absence from work without authorization or because of illness or injury, was subject to the Last Contract's Grievance procedure. Miscellaneous provisions were that an employee to receive vacation benefits had to be employed on May 1, and where an employee was terminated prior to the receipt of any vacation benefits to which he was entitled, he was paid vacation pay due him upon termination.

[5]The parties stipulated that a majority of the striking employees worked 60 percent of the pay periods in the 9-month period from May 1, 1966 to September 29, 1967. The employees contended that they had coming to them accrued vacation pay based on this time worked. Respondent's President Samuel W. Duncan testified that all employees worked during the 1966 period except those absent because of illness or for some personal reason. There were no layoffs due to a reduction in force. He also testified this was the situation for the period from January 1, 1967, to January 29, 1967.

[6]In the summer of 1965, and in the prior summers starting with 1960, Respondent shut down for maintenance and repair. This was a normal vacation period for employees. Employees were given paid vacations in 1965 and the prior summers in accordance with article XI of the Last Contract. In the summer of 1966, Respondent did not shut down for maintenance and repair. It remained in continuous operation to fill outstanding orders. Employees received vacation pay in 1966 in accordance with article XI of the Last Contract.

enough time had elapsed for the study and determination, and requested Respondent to inform it, as the certified collective-bargaining representative still authorized to represent the strikers, when the strikers could expect payment of their long deferred vacation benefits.

In a letter dated March 4, 1968, Respondent, by President Duncan, informed Steelworkers that the petitions of September 13, 1967, and September 14, 1967, of Employees Association and Respondent, respectively, had raised a question of Steelworkers' majority representation, and, therefore, Respondent lacked authority to respond to the inquiry in Steelworkers' letter of February 8, 1968,[7] as the whole question of "vacation pay and eligibility" was an "obvious subject for collective bargaining," and could only be negotiated with the majority representative. The letter of Respondent also stated that during the first negotiations meeting after the Steelworkers was certified,[8] Respondent had proposed that all past practices, economic and noneconomic, be continued while negotiations were in progress and new agreements were reached, and Steelworkers rejected this proposal; that Respondent then proposed that the Last Contract, to which Respondent and Employees Association were parties, be continued in effect except for the grievance procedure and cost of living features, and Steelworkers also rejected this proposal; that these rejections of Steelworkers were not changed or modified during the bargaining negotiations which ended on September 13, 1967; and that the whole subject of vacations, including 1967 vacation pay for strikers, was discussed during the course of the bargaining, but no agreement was reached on it by Steelworkers and Respondent.

Respondent concluded its letter of March 4, 1968, with the statement that it could not discuss vacation pay with Steelworkers until it was again certified by the Board. In a letter dated March 20, 1968, Steelworkers, *inter alia,* replied that in its letter of February 8, 1968 it did not request bargaining, on behalf of the strikers, on vacation pay already earned, and which Respondent had already paid to nonstrikers, but merely inquired as to the decision dealing with vacation pay for strikers that Respondent stated it would make in its letters to employees of September 21, 1967. Steelworkers further stated that the rights of strikers to this vacation pay existed "as a matter of national policy and law" and not on past or future bargaining between Respondent and Steelworkers.

As stated *supra,* the Steelworkers terminated the strike on January 31, 1968, and on behalf of the strikers offered unconditionally their return to work. The Steelworkers so notified Respondent in a letter dated January 31, 1968. On February 27, 1968, Steelworkers sent a letter or memorandum to its members who were employees of Respondent and who had been on strike. It apprised them of the Steelworkers' notice to Respondent of the termination of the strike, and the unconditional offer it made on their behalf to return to their jobs. Steelworkers further informed these employees of Respondent that it had no objection to their reporting to the Respondent's personnel office to let Respondent know they were available for employment, or as an alternative, to complete a form letter, attached to the Steelworkers' letter, addressed to President Duncan informing him that they desired to return to their jobs, and were available for employment, and to return it to Steelworkers' office which in turn would send it to Respondent. Steelworkers also informed the members with other jobs who intended to report to Respondent's personnel office, that they ran the risk of discharge from those jobs if they revealed the identity of their employers. It also informed them they did not have to disclose to Respondent whether their jobs were permanent or substantially equivalent, but needed only to state that although they were presently employed they wished to return to their jobs with Respondent.

In March or April 19, 1968, Respondent recalled two former strikers as permanent employees. It also recalled at this time an additional 39 or 40 of the former strikers. Those in this latter group were told they were being recalled as temporary employees.[9] The two employees identified as permanent employees, and the employees identified as temporary employees were assigned to the same jobs they held prior to the strike. The so-called temporary employees made inquiries to Respondent about their seniority, but were told that Respondent had no answer for them.[10] Respondent kept a list of employees identified as permanent employees and a list of employees identified as temporary employees. On the first list were the names of the nonstrikers, those who abandoned the strike before its termination, and the two employees (John Wheeler and Fred Wheeler) who had been recalled as permanent employees. On the second list were the names of the strikers who were on strike the entire period of the strike, and who had been recalled after the strike as temporary employees.

B. *Respondent's Defense to Meet Evidence in Support of Complaint*

[7] There had been no bargaining since the filing of the Employees Association's petition on September 13, 1967.

[8] October 4, 1966.

[9] President Duncan testified than in September 1967, he decided that the employees then working (approximately 175) were all the permanent work force Respondent needed for the following 2 years to meet its estimated orders during that period. Evidence was introduced by Respondent to show that its production needs during the 2-year period would be only one-third of what it was prior to the strike. This evidence is discussed *infra.* President Duncan also testified that the 39 or 40 former strikers recalled as temporary employees were recalled to produce castings needed by a customer to correct an error it made in its inventory. On June 5, 1968, Respondent posted a notice signed by President Duncan in which was stated that the Respondent had caught up with the increase in demand for castings brought about by a customer's error in its inventory records, and for the following 2 weeks its foundry would operate on a 4-day weekly schedule, and if there should be no increase in needed production, Respondent would return to a 5-day week and make the necessary adjustment in its working force by decreasing the number of temporary employees. It was also stated in the notice that the "temporary employees," when called in, were told they were being called in on a "temporary basis" to meet the increase in demand due to the customer's error in its inventory records. The notice ended with the statement that where departments required more than a 4-day week, the adjustment would be handled by the foreman.

[10] President Duncan testified that "we just didn't tell them anything because we had a permanent work force and that had been stated and we couldn't see any permanent increase in the number of employees." Henry Reed, a recalled "temporary employee," testified that at the time of recall he asked Personnel Director Green about seniority, and he replied that he had lost seniority for the year 1967. Reed was an employee of Respondent for 17 years. Green denied he made this statement to Reed. He testified that he said to Reed that he could not give him an answer as there were a number of things before the Board that were not resolved. I credit Green. As stated *supra,* fn. 3, at the election of January 26, 27, and 28, 1968, Respondent challenged the right of the strikers still striking to vote on the ground that they were no longer employees.

1. Denial of procedural due process

In support of its defense of denial of procedural due process, Respondent refers to the complaint and contends that allegations therein do not place it sufficiently on notice of the illegal conduct charged against it to permit it to prepare its defense. The basis of this position is the same as those set out in fn. 1, *supra,* in reference to and in support of Respondent's pre-hearing motions.

Specifically, Respondent contends: That the complaint does not disclose whether the vacation pay allegedly denied striking employees but paid to nonstrikers and those abandoning the strike before its termination accrued during the months from May 1, 1966, up to and including January 29, 1967, when the strike began, or accrued during the entire period from May 1, 1966, up to May 1, 1967; That General Counsel did not name in the complaint the employees who were denied the vacation pay, or disclose whether any of these employees had not lost the status of employees because of acts of violence, permanent employment elsewhere, voluntary resignation, or a substantial change in Respondent's business; That General Counsel's complaint does not disclose the names of the striking employees allegedly denied seniority rights and privileges, nor the nonstriking employees and striking employees abandoning the strike before its termination, who were given seniority rights and privileges not given to the striking employees, and that the complaint does not state the seniority rights and privileges denied the one group of employees and given to the other.

The allegation in the complaint of denial to strikers of 1967 accrued vacation pay does not clearly disclose that this vacation pay accrued only in the months from May 1, 1966, to the beginning of the strike on January 29, 1967. Accrued vacation pay could be construed to refer to vacation pay allegedly accrued during the strike period from January 29, 1967, to May 1, 1967, since Steelworkers in the bargaining negotiations proposed that time on strike be considered as time worked for the purpose of determining 1967 vacation pay. Respondent concedes that General Counsel stated for the record that the accrued vacation pay allegedly denied the strikers in 1967, was vacation pay accrued only during the months from May 1, 1966, to January 29, 1967, and not during the strike period from the latter date to May 1, 1967. Respondent's counsel was apprised by the Examiner that he would consider a motion for a continuance at the close of the hearing to meet any surprise to Respondent from General Counsel's statement for the record. Respondent did not make such a motion.

It is undisputed that Steelworkers, in its charge of March 20, 1968, alleged only denial to strikers of vacation pay that accrued from May 1, 1966, to January 29, 1967; that Respondent's records show the names of employees who worked during the payroll periods from May 1, 1966, to January 29, 1967, and did not work during the strike period from January 29, 1967, to January 31, 1968; and that Respondent's records show the employees who were considered permanent employees on January 31, 1968, and the two employees recalled as permanent employees in March or April 1968, and the employees recalled as temporary employees in March or April 1968. Respondent did not introduce evidence, or attempt to do so, of striking employees who did not work from January 29, 1967, to May 1, 1967, because they voluntarily resigned, secured permanent employment elsewhere and decided to retain it; were laid off because of lack of work due to a permanent change in Respondent's business structure or operations, or engaged in picket line violence from January 29 to May 1, 1967, warranting discharge or denial of employee benefits.

2. Charge of denial of accrued vacation pay and seniority barred by Section 10(b) of the Act

In support of its defense that the charge Respondent denied strikers accrued vacation pay is barred by Section 10(b) of the Act, Respondent relies on evidence, documentary and oral, it introduced, that on March 29, 1967, in a bargaining session, Steelworkers presented a revised contract proposal that included proposals that in the determination of vacation time and pay for 1967, strike time be considered as time actually worked, and economic benefits be made retroactive to cover the period between the beginning of negotiations on October 4, 1966, to the date of execution of the agreement, and that Respondent counterproposed on that date revised contract language, economic benefits in the Last Contract effective the date agreement was reached, and a flat sum payment to employees on the active payroll after ceasing to strike in lieu of any special treatment for time on strike or retroactivity for the interim period between the resumption of bargaining and the date of agreement, and that on August 28, 1967, Respondent flatly rejected Steelworkers' proposal that strike time be considered as hours worked for the determination of vacation pay, and the Steelworkers' proposal, made for the first time on August 28, that nonstrikers and strikers who abandoned the strike before its termination be replaced by strikers in available jobs after the termination of the strike. Respondent contends that the alleged unfair and illegal conduct began on August 28, 1967, if it did begin, and not on September 21, 1967, as alleged in the complaint. If Respondent's contention is sustained the alleged unfair labor practice would not be within the 10(b) period.

Although Respondent alleged as an affirmative defense that the charge it denied seniority to strikers returning to their employment after the termination of the strike is barred by Section 10(b) of the Act, it presented no evidence or argument in support of this defense.

3. Respondent's custom or practice that became a term or condition of employment with respect to the right to receive vacation pay

To meet the evidence that Respondent discriminated against strikers by refusing to give them vacation pay in 1967 Respondent introduced testimony that during the 17 years it had collective-bargaining relations with employees through their representatives and particularly since 1960, Respondent did not give a paid vacation or vacation pay to an employee who was not on the payroll of May 1, with the exception that an employee on authorized leave or sick leave on May 1 was considered to be on the May 1 payroll if he was back on the payroll by October 1, and that in determining what employees were entitled to paid vacations it interpreted article XI of the Last Contract and a similar provision in prior contracts to mean that an employee to be entitled to a paid vacation had to be in continuous employment, be on the payroll on May 1 of the year the paid vacation was given, or by October 1 if absent because of sick leave or authorized leave, and have worked during 60 percent of the payroll periods in the 12 months ending on this May 1. It concedes that there is no reference to a strike in article XI of the Last Contract or in the similar provisions in prior contracts, that in the 90

years it had been in business prior to the strike beginning January 29, 1967, its employees had never engaged in a strike, and it was never required to determine prior to the summer of 1967 whether a striker was entitled to vacation pay.

4. Respondent's evidence to show terms and conditions of employment including vacation pay for 1967, seniority and seniority rights and privileges, and questions relating to terms and conditions of employment, arising during negotiations, were subject to, and to be determined by, negotiations, and impasse and filing of petitions raising questions of representation prevented these determinations

Respondent's evidence shows that Respondent and Steelworkers discussed from October 4, 1966, until September 13, 1967, all terms and conditions of employment, both economic and noneconomic. In general, agreement on noneconomic issues and contract language was reached by January 1967. Economic issues including vacation pay and seniority were discussed in January 1967. An impasse was reached at the end of January, and Steelworkers called a strike. The parties attempted to break the impasse in March 1967, and again in August and September 1967, by a series of three or four special meetings to explore issues on which agreement could be reached, and on which agreement would be reached when they were brought to the bargaining table. The bargaining ended when the petition was filed by Employees Association on September 13, 1967.

In the October 4, 1966, meeting Respondent proposed that prior customs and practices established over the 17 years of bargaining between Respondent and Employees Association be effective during the period of negotiations, and that Steelworkers rejected this proposal. It is also clear that on October 4, Respondent's proposal that the provisions of the Last Contract, which was in effect between Respondent and Employees Association and terminated on May 18, 1966, except those dealing with cost of living, grievance procedure, Christmas bonus and picnic, be effective for the period of negotiations, and Steelworkers rejected this proposal. In November 1966, Steelworkers asked Respondent to give the Christmas bonus and picnic at Christmas 1966, that it gave under the Last Contract, and Respondent agreed to give the bonus and not the picnic.

In January 1967 agreement was reached on some of the issues involving seniority but not on all of them. In March 1967 and again on August 28, 1967, Steelworkers proposed that time on strike be counted as time worked for the purpose of determining qualifications for 1967 vacation pay, and on August 28, 1967, Steelworkers proposed that after the termination of the strike strikers replace nonstrikers and those abandoning the strike before termination, and that Respondent rejected both of those proposals, particularly on August 28, 1967. In January, March and September 1967, Respondent proposed, in response to Steelworkers' proposals regarding the counting of strike time as time worked and the replacement of nonstrikers by strikers, and in response to the proposal of Steelworkers that economic benefits be made retroactive, that a lump sum be paid to employees employed at the termination of the strike to cover 1967 vacation pay and other matters to which negotiated benefits would apply if made retroactive.

5. Respondent's evidence to show that due to decreased production needs for 1968 and 1969 resulting from a labor dispute, only employees employed at termination of strike and two others were permanent employees with seniority rights and privileges, and forty employees recalled as temporary employees after strike were not permanent employees

Respondent's evidence shows that at the beginning of the strike, Respondent employed approximately 350 employees in its foundry and approximately 30 employees in its machine shop, and at the beginning of the hearing on June 10, 1968, it employed in its foundry 175 to 200 employees it identified as permanent employees, and in its machine shop 15 employees it identified as permanent employees, and in addition it employed 40 employees it identified as temporary employees. The evidence indicates, and I find, that at the termination of the strike, Respondent employed approximately 175 to 200 employees in the foundry, and 15 employees in the machine shop. President Duncan testified that in September 1967, Respondent estimated that its projected business needs for 2 or 3 years required only 175 to 200 permanent employees. He testified that he projected the same production in 1968 and 1969 as Respondent had in 1967 because Respondent would have a labor problem in those years as in 1967. He stated that the labor problem in 1968 and 1969 would be the contest between Steelworkers and Employees Association for the right to represent Respondent's employees as collective-bargaining representative.[11]

Respondent shipped to customers in 1967, 5,361 tons of castings compared with shipments in 1966, 1965, and 1964 of 12,218 tons; 10,665 tons; and 10,335 tons.[12]

President Duncan testified that during the strike 225 patterns were returned to customers, at their requests, so that they could send them to other manufacturers of castings for the production by them of castings they needed. Duncan testified that only 33 of the patterns had been returned to Respondent by June 10, 1968. Duncan also testified that Respondent had between 2,000 and 10,000 patterns, and that the patterns were used an average of 8 to 10 years both for original equipment and replacement castings.

Duncan and Philip Mathers, production manager, testified that 66 percent of the castings shipped in 1966 to customers were shipped to Caterpillar Tractor Company. Caterpillar withdrew 144 of the 225 patterns withdrawn during the strike. Mathers testified that the patterns removed by Caterpillar accounted for 75 to 80 percent of the castings Respondent made for Caterpillar prior to the strike. Duncan testified that Caterpillar has considered Respondent a prime supplier since the end of World War II. As stated, Duncan expects the decreased production to last as long as Respondent has a labor problem, and that the problem following the strike is the resolution of the issue of majority collective-bargaining representative.

[11] Steelworkers was certified in July 1966 for the unit that Employees Association had represented for 17 years. In September 1967, at the close of the certification year for Steelworkers, Employees Association claimed in a petition for representation that it was again the majority representative.

[12] I consider 1965 and 1964 more representative. Respondent had additional orders in 1966 which required three shifts and operation during the customary period for shutdown for maintenance and repair and for employee paid vacations.

No evidence was presented to show that Caterpillar would not resume reliance on Respondent as a prime supplier as soon as the so-called labor problem is resolved. Nor did Respondent present evidence of any change in its productive capacity, or any decision to subcontract production it engaged in prior to the strike, or any other factor relating to its operation that would disclose lower production for the 2-year period following the strike or thereafter.

Analysis, and Findings and Conclusions of Fact and Law

On the foregoing findings of fact I make the following analysis, and findings and conclusions of fact and law.[13]

I find no merit in Respondent's defense that it was denied procedural due process by not being put on notice of what it had to meet either with respect to denial of vacation pay for 1967, or denial of seniority rights and privileges to employees recalled to work after the strike as temporary employees. While this claim of Respondent was disposed of as a preliminary matter prior to the hearing on complaint and answer, I again find that Respondent had adequate notice of what it had to meet.

The group or class allegedly denied vacation pay were the strikers who remained on strike during the full period of the strike. Respondent knew who its employees were on January 29, 1967, those who did not strike, and those who abandoned the strike in the period from its inception to its termination and returned to work, and the date they returned. The class or group denied 1967 vacation benefits and those who received them are apparent from these data.

Respondent was aware from the long bargaining period discussions that at most the complaint alleged that the denied vacation pay was based on hours worked from May 1, 1966, to the beginning of the strike on January 29, 1967, and possibly on strike time from the latter date until January 31, 1968. If it were for both periods, Respondent had a legal defense for the second period namely that no type of earnings accrues during either an economic strike or an unfair labor practice strike. There remained only the period from May 1, 1966, to January 29, 1967. In any event, General Counsel stated for the record that the vacation pay for 1967, allegedly denied was based only on hours worked from May 1, 1966, to January 29, 1967. Respondent did not ask for a continuance at the close of the hearing to permit it to prepare against any surprise that remained after General Counsel made this statement for the record.

Respondent knew who the 40 employees were who were told on being recalled after the strike that they were only temporary employees, and knew they were the employees who inquired about seniority and to whom he said he had no answer or said the question was before the Board in the representation proceeding. Respondent also knew who the employees were who were named in a list of temporary employees, and to whom it referred in its June 5, 1968, memorandum as temporary employees, and who would be the employees affected by a reduction in force. And Respondent knew who the employees were who were named in its list of permanent employees, and considered to be entitled to the rights and privileges of permanent employees including those based on seniority.

The special showings Respondent alleged were the burden of General Counsel, that is, those relating to permanent employment elsewhere, violence on the picket line, voluntary resignation or permanent change in Respondent's business, are defenses to the application of the remedy against discrimination in favor of the discriminated group or class to certain employees in the group or class, and are the burden of Respondent and not of the General Counsel.[14]

Section 10(b) of the Act is not a bar to the finding of a violation against Respondent. The charge was filed against Respondent on March 20, 1968. I find that Respondent denied vacation pay to the strikers in its memorandum to them of September 21, 1967, in response to their inquiries, both oral and written, in August and September 1967, as to when they would receive it. The inquiries followed the giving of vacation pay, characterized by Respondent as pay for time not worked, given in August 1967, and thereafter in 1967, to employees who did not strike or strikers who abandoned the strike and were back at work by September 13, 1967. Respondent denied the recalled strikers seniority rights and privileges relating to recall, rehiring and reduction in force in March or April 1968, when it did not answer the inquiries of the recalled strikers about these rights and privileges because it did not consider these employees as permanent employees, and answered one employee that it could not answer his inquiry because the matter was before the Board in the representation proceeding. The actions taken by Respondent by which it denied to strikers the 1967, vacation pay and seniority rights and privileges are both within the required 6-month period specified in Section 10(b) of the Act.[15]

The rejection in the course of bargaining on March 29, 1968, and August 28, 1968, of Steelworkers' proposals that strike time be counted as time worked for the purpose of qualifying for vacation pay, and that strikers replace nonstrikers and strikers abandoning the strike before termination, do not constitute illegal denial of vacation pay or seniority rights and privileges to strike. Neither do proposals of Respondent made in the course of bargaining that in lieu of vacation pay accrued to strikers a lump sum be paid to those of them who were returned to work and were again on the payroll. Proposals and counterproposals, rejections and acceptances made in the course of bargaining are not to be equated with denials or refusals, admissions, acceptances or rejections which are evidence of illegal conduct. They are considered in the same light as proposals, counterproposals, denials, acceptances, rejections and acceptances made in discussions exploring the possibility of settlement.

Respondent's employees who engaged in an economic strike starting January 29, 1967, and terminating on January 31, 1968, had a statutory right to engage in this strike and to be free of any action or conduct by Respondent which impeded or limited, directly or

[13] Credibility resolutions and resolutions of conflicts in evidence have been made upon evaluation of demeanor testimony and oral and written evidence. See *Felix Makevicius, d/b/a Brighton Bakery*, 158 NLRB 512, fn. 1; *N.L.R.B.* v. *United Brotherhood of Carpenters, Local 517, AFL*, 230 F.2d 256 (C.A. 1); *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749 (C.A. 2), reversed on other grounds 340 U.S. 474. All outstanding motions to strike testimony or other evidence are denied.

[14] *Sea Land Service, Inc*, 146 NLRB 931, 950, enfd 356 F 2d 955 (C.A. 1), cert. denied 385 U.S. 900, *N.L.R.B.* v. *Bin-Dictator Company*, 356 F.2d 476, (C.A. 6), enfg. in part and setting aside in part 143 NLRB 964, and *N.L.R.B* v *Jackson Tile Manufacturing Company*, 282 F.2d 90, 92 (C.A. 5), enfg.124 NLRB 218

[15] Sec. 10(b) of the Act, and Secs. 102.111, 102.113, and 102 114 of the Board's Rules and Regulations

indirectly, this statutory right.[16] Moreover, these strikers had the status of employees during the strike and following the strike, did not lose this status merely because of the length of time they were on strike, and may not be equated with new employees and denied vacation pay earned before the strike or denied preferences to which they are entitled by reason of tenure they had as employees before the strike.[17]

I find and conclude that General Counsel's case, *prima facie*, shows that the strikers who remained on strike until its termination were denied vacation pay or benefits for 1967, given to nonstrikers and strikers who ceased striking before September 13, 1967, and that the 40 employees who remained on strike until its termination and were recalled to their jobs by Respondent as temporary employees after the termination of the strike, were denied preferences relating to recall or reinstatement or reduction in force they would have had if they had not engaged in the strike or abandoned it before its termination, and which were given to nonstrikers and strikers who abandoned the strike before its termination.

Respondent concedes that the strikers who had not returned to work prior to September 13, 1967, received no vacation pay for 1967, and that non-strikers and strikers who abandoned the strike by September 13, 1967, and were back on the payroll at that time, were paid wages for the 2 weeks they did not work in August 1968, when the plant was shut down for maintenance and repair, supplemented by an amount equal to the amount in excess of 2 weeks' pay they would have been entitled to receive under the vacation benefits provision of the Last Contract. There is no difference between the 1967, vacation pay denied the strikers and the so-called supplemented 2 weeks' pay for no work given to the nonstrikers and the strikers who abandoned the strike.

Respondent also concedes that in answer to inquiries of 39 of the above-described 40 temporary employees relating to seniority they had acquired by tenure as employees before the strike, it said that it had no answer, and that it gave this answer because it did not consider the "40" to be part of the roster of permanent employees, and that in answer to the inquiry of one of the "40" about seniority, it said that it did not have an answer as the question whether they were employees was before the Board in the representation case it had filed on September 14, 1967.[18] The issue whether a person is an employee in connection with the charge of a violation of Section 8(a)(1) and (3) of the Act in an unfair labor practice proceeding is a matter to be considered and decided *de novo* in the unfair labor practice proceeding. It is not resolved in the representation proceeding.[19] I have found *supra*, that *prima facie* the strikers continued to be employees during and after the strike and were entitled to the benefits and preferences which they had earned during this tenure as employees before the strike.

The evidence and findings as stated show *prima facie* that in violation of Section 8(a)(1) and (3) of the Act, Respondent has discriminated against employees who were on strike from January 29, 1967, to January 31, 1968, by denying them vacation pay benefits for 1967, paid to nonstrikers and strikers abandoning the strike before September 13, 1967, and has discriminated against 40 of the strikers recalled as temporary employees after the termination of the strike by denying them seniority rights and privileges they earned during their tenure as employees before the strike, and given to nonstrikers, strikers who abandoned the strike before termination, and two employees recalled as permanent employees after the strike. The denial of these seniority rights and privileges to the recalled strikers while continuing to give them to the other employees vested the latter group in fact with superseniority.[20] Discrimination because of participation in concerted activity such as participation in a strike is illegal conduct discouraging membership in a union, violative of Section 8(a)(3) of the Act.[21]

General Counsel's *prima facie* case of discrimination by Respondent shifted the burden of going forward to Respondent and of presenting substantial business justifications for the discrimination.[22]

Respondent contends that the right to vacation pay, if it does exist, could only stem from contract or from established customs and practices. Respondent then argues that no contract was in effect during the period from May 1966, through 1967, and thereafter, so the right is not from contract. I agree that the right could not arise from contract as the Last Contract was legally terminated, effective May 18, 1966.[23] Respondent then follows with the contention that striking employees not on the payroll on May 1, 1967, had no right either by established custom or practice or by extension of the last contract for the reason that on October 4, 1966, Steelworkers rejected Respondent's proposal that past practices, economic and noneconomic, remain in effect for the period of the negotiations, and later on October 4, 1966, rejected Respondent's proposal that the provisions of the last contract remain in effect during the period of negotiations. In other words, they abandoned or waived their right to vacation pay by refusing to agree to the retention of all customs and practices and to all provisions of the last contract.

Refusal to enter into a contract to retain rights already possessed does not constitute abandonment of, or waiver of these rights. The first strike Respondent experienced in its 90 years of existence was one initiated to by Steelworkers on January 29, 1967. Therefore, no striking employees absent from the payroll of May 1, of any year prior to 1967, requested vacation benefits for that year. Nor did Respondent decide or have to decide during the 17 years of collective-bargaining relations, particularly from 1960, to May 16, 1966, whether striking employees not on the payroll on May 1 were entitled to vacation benefits including vacation pay. Moreover, the Last Contract was not extended by the parties for the period of the negotiations. So the striking employees had no right by custom or practice, or by contract, to abandon or waive.

[16] Sec. 13 of the Act.

[17] Sec. 2(3) of the Act, and *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375, affg. 153 NLRB 425.

[18] Respondent, in the representation case, contended that the strikers on strike on September 14, 1967, were no longer employees by reason of its decision in September 1967, that their services would not be needed by reason of the loss of orders resulting from a labor dispute.

[19] *N.L.R.B.* v. *Amalgamated Clothing Workers of America*, and *N.L.R.B.* v. *Sagamore Shirt Company*, 365 F.2d 898 (C.A.D.C.); *N.L.R.B.* v. *Heights Funeral Home, Inc.*, 385 F.2d 879 (C.A. 5); and *Ross Porta Plant, Inc.*, 166 NLRB No. 40, (TXD).

[20] *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26; *N.L.R B.* v. *Fleetwood Trailers Co.*, 389 U.S. 375; *N.L.R.B.* v. *Frick Co.*, 397 F.2d 956 (C.A. 3); *Kroger Co.* v. *N.L.R.B.*, 401 F.2d 682 (C.A. 6).

[21] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221; and *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26.

[22] *N.L R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26.

[23] *Knight Morley Corp.*, 116 NLRB 140.

I have found that the strikers' right to 1967, vacation pay stems from the Act. A waiver of this right must be an expressed waiver and not one to be inferred.[24] The rejection by Steelworkers of Respondent's proposal of the retention of all past practices, economic or noneconomic, that were established during Respondent's collective-bargaining relations with Employees Association, the former bargaining representative of Respondent's employees, is not an expressed waiver of a statutory right, but one, at most, to be inferred. Neither is the rejection by Steelworkers of the proposal of the retention of all of the provisions of the Last Contract.

Respondent also argues that by the language of article XI of the last contract and the language of similar provisions in prior contracts effective from 1960, Respondent's interpretation of this language to mean that an employee to be entitled to vacation benefits had, *inter alia,* to be on the payroll on May 1 of the year the vacation benefits were given, Respondent's denial of vacation benefits to employees who were not on the payroll on May 1, and the acquescience of Employees Association and the employees it represented with respect to both Respondent's interpretation of the vacation benefits provisions of the contracts, and its practice in administering them, Respondent had a vested right by established custom or practice to deny vacation benefits to all employees, including those on strike, who were not on the May 1 payroll, and the striking employees expressly waived their statutory right to be protected against discrimination for engaging in a protected activity.[25]

I find no merit in this argument of Respondent. First of all, the relevant contract language refers only to continuous employment prior to May 1, employment on May 1, and working in 60 percent of the payroll periods in the 12 months prior to May 1. It is silent about presence on payroll on May 1. Moreover, prior to May 1, 1967, and thereafter, Respondent was not faced with the problem of determining whether strikers not on the payroll on May 1 but who were in continuous employment prior to May 1, were employees on May 1, and worked 60 percent of the payroll periods in the 12 months prior to May 1, were entitled to vacation benefits. It is true that Respondent had to make this determination with respect to employees not on the payroll on May 1 because of layoff, sickness, or authorized leave, and decided against their eligibility. But employees on layoff, or absent because of sickness or authorized leave, may not be equated with employees absent from the May 1 payroll because they were engaging in their statutory right to strike and were relying on their statutory right to be protected from discrimination for engaging in this protected activity.[26]

I do not find in these circumstances any evidence that Respondent had a contract right, or a right arising from established custom or practice to deny strikers 1967, vacation pay because they were striking on May 1, 1967, and not on the payroll at that time, or that the striking employees waived their statutory right to strike and to be free from discrimination for engaging in this protected activity. A contrary ruling would be a holding that Respondent had the power to render impotent an Act of Congress enacted into law in the public interest.

I find no merit in the defense that vacation pay for 1967, is a bargainable issue, and this issue cannot be resolved because the employees have no majority representative with which it can be bargained. It is undisputed that a question regarding the right of Steelworkers to represent Respondent's employees as collective-bargaining representative was raised by petitions Employees Association and Respondent filed on September 13, 1967, and September 14, 1967, respectively, and issues regarding vacation benefits and seniority as well as other issues were not resolved in the bargaining due to an impasse, and the termination of the bargaining on the filing of the Employee Associations' petition on September 13, 1967. However, strikers' vacation pay for 1967, and seniority rights and privileges for recalled strikers, identified as temporary employees, stemming from tenure as employees prior to the strike, are not bargainable issues.

Negotiation of issues relating to wages, hours and other terms and conditions of employment by representatives of management and employees to reach a collective-bargaining contract to be effective *in futero* on execution of the whole contract or when agreement on each provision is reached does not constitute a waiver of an already existing statutory right or even an already existing right by established custom or practice or by contract. Neither does it constitute an admission by the employees' representative that the subject matter of the prior existing right is a bargainable issue, and the right does not exist. Nor does a waiver arise from an agreement reached on a contract provision providing benefits that include already existing benefits coupled with a proposal by the bargaining representative that the provision be made retroactive, or from a proposal by the employees' representative that includes vacation pay benefits by statutory right as well as benefits not covered by the statutory right, with or without an accompanying proposal that the proposal on being accepted be made retroactive. The evidence shows Steelworkers proposed that eligibility for 1967 pay be premised on strike time as well as time worked before the strike. Nor do any of the above bargaining situations constitute an admission that all of the subject matter involved in a bargaining situation is bargainable by the parties.

Steelworkers clearly disclosed in its letter of March 20, 1968, to Respondent that it had not made such a waiver or admission during bargaining, when in reply to Respondent's letter of March 8, 1968, in which Respondent stated that the 1967 vacation pay for strikers was a bargainable issue, it said that the rights of strikers to vacation pay existed "as a matter of national policy and law" and not on past or future bargaining between Respondent and Steelworkers. The Examiner finds merit in this statement of Steelworkers.

The 40 employees, identified by Respondent as temporary employees, recalled by Respondent after the strike, sometime in March or April 1968, are not to be equated with new employees. This is clear from the Supreme Court's decisions in *N.L.R.B.* v. *Fleetwood Trailers Co.,* 389 U.S. 375, and in *N.L.R.B.* v. *Erie Resistor Corp.,* 373 U.S. 221. They had not been permanently replaced.[27] At the time of the recall, they were employees with seniority rights and privileges they had accumulated prior to the time they went on strike, even though they were recalled only to meet an emergency order. These seniority rights and privileges are factors to

[24] *Cloverleaf Division of Adams Dairy Co.,* 147 NLRB 1410, 1412.

[25] See *Shell Oil Co.,* 149 NLRB 283, 285.

[26] *N.L.R.B.* v. *Frick Co.,* 397 F.2d 956 (C.A. 3), enfg. 161 NLRB 1089, 1107. Respondent's policy to consider employees absent from the payroll on May 1 because of sickness or authorized leave to have been on the May 1 payroll if they returned to work before October 1, and the fact that the strikers were still striking on October 1, 1967, do not affect the issue.

be considered in rehiring, and layoff or other reduction in force. When Respondent in March or April 1968, replied to the inquiries of the 40 employees about seniority by the statement it did not have an answer, and gave this answer because they were not on the roster of Respondent's permanent employees, and in its notice of June 5, 1968, to employees that any reduction in force would be made only in the group of the 40 employees, Respondent in fact considered these employees as new employees, and as employees who had lost any seniority rights and privileges they had accumulated prior to the strike. By this position, Respondent, in fact bestowed on the nonstrikers, and the strikers who abandoned the strike and returned to work before its termination preferences relating to rehiring, layoff and other reduction in force that it denied the 40 employees. This action amounted to superseniority.[28]

Respondent argues that its estimate in September 1967, of the castings it would produce in 1968 and 1969, based on the projection of its production in the 1967, strike period would be approximately what it was during this strike period, or approximately 50 percent of its production in 1965 and 1966. On this estimate, it concluded that it would need only 175 to 200 employees, the number then employed plus approximately an additional 25 more, and there would be no need for the approximately 175 employees on strike. It reasoned that the production needs in 1968 and 1969 would be the same as in 1967, because in 1968 and 1969, it would still be involved in a labor dispute, and Caterpillar Tractor Co., to which it had shipped 60 percent of its production in 1966, and a few other customers, would rely on other suppliers until the labor dispute was resolved.

Respondent considered that the strike and the contest between Employees Association and Steelworkers for collective-bargaining representative initiated by Employees Association's petition of September 13, 1967, and its petition of September 14, 1967, would keep the labor dispute going until through 1969. In its questioning of Steelworkers' majority representative status that it initiated in its petition of September 14, 1967, and particularly in the election of January 26, 27, and 28, Respondent took the position that the strikers were no longer employees. As found above, it took this same position at the termination of the strike.

The denial of seniority rights with respect to rehiring and reduction in force to the 40 former strikers recalled after the strike to produce castings to meet an emergency order, if legal, at most gave Respondent the opportunity to lay them off or terminate them prior to taking this action against non-strikers and strikers who returned to work before the termination of the strike. If the strikers were accorded the seniority rights and privileges, some of them would have preferences in future rehiring, and might well have them over the non-strikers and the strikers who returned before the strike's termination in case of a reduction in force. Conceivably there might have been a slight money saving to Respondent, although it is not apparent.

In these circumstances, and on this evidence, I find no substantial business or economic justification in the denial of the seniority rights and privileges to the 40 recalled strikers which in fact accorded superseniority to the nonstrikers and strikers who returned to work prior to the termination of the strike. On the other hand, this discrimination, coming as it did at the time Respondent was contending that Steelworkers no longer represented a majority of its employees because the strikers were no longer employees, discouraged membership in Steelworkers.

Respondent has failed to present substantial business or economic justification for its discrimination against striking employees by denying them 1967 vacation pay, and by denying to those of them recalled after the termination of the strike seniority rights and privileges connected with rehiring and layoff or other reduction in force accruing to them before the strike and after being recalled to employment following the strike. Respondent has, therefore, discriminated against employees by this conduct in violation of Section 8(a)(3) and (1) of the Act.[29]

From the above evidence, findings and analysis, I conclude and find that it was apparent to Respondent that its discrimination against the striking employees would have the foreseeable consequence of discouragement of membership in the Steelworkers. Denial on September 21, 1967, of vacation pay for 1967, to striking employees who were members of or represented by Steelworkers, the certified bargaining representative, after paying vacation pay to nonstriking employees and strikers who ceased striking and returned to work, and shortly after Employees Association filed a petition for representation on September 13, 1967, and Respondent filed a petition for representation on September 13, 1967, in which these petitioners contended that Steelworkers was no longer the collective-bargaining representative, is conduct that carried on its face discouragement of membership in Steelworkers. Denial to recalled strikers shortly after the termination of the strike seniority rights and privileges accuring to them prior to the strike, also carried on its face discouragement of membership in Steelworkers. For this reason, Respondent illegally discriminated against the striking employees in violation of Section 8(a)(1) and (3) of the Act irrespective of the presence or absence of business or economic justifications. The illegal motive is inferred from Respondent's engaging in the conduct even though the consequences were foreseen.[30]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent engaged in conduct violative of the Act, I shall recommend that Respondent be ordered to cease and desist from engaging in such conduct, and take such affirmative action as appears necessary to effectuate the purposes of the Act.

Having found that Respondent discriminatorily withheld from employees on strike on January 30, 1968, or who had terminated striking and returned to work, but

[28] See *N.L.R B.* v. *Mackay Radio and Telegraph Co.*, 304 U.S. 333.

[29] *N.L.R.B.* v. *Fleetwood Trailers, Co., supra*, 389 U.S. 375, and *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221.

[29] Cases cited fn. 20, *supra*.

[30] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221; *Kroger* v. *N.L.R.B.*, (C.A. 6) enfg. in part 164 NLRB No. 54; and *Radio Officers* v. *N.L.R.B.*, 347 U.S. 17.

had not returned to work by September 13, 1967, vacation pay for 1967, to which they were entitled, I shall recommend that Respondent be required to pay to each of them as 1967, vacation pay the 2 weeks' wages Respondent paid for his particular job, or a similar job, to employees for the 2 weeks' pay period in August 1967, when they did not work plus any supplemental amount to which he is entitled under the formula used by Respondent to compute the supplemental amounts Respondent paid the employees who received 1967 vacation pay. The amount due each employee shall bear interest at 6 percent from the first date employees were paid the 2 weeks' pay for the 2-week period in August, 1967, they did not work supplemented by amounts computed under the formula in article XI of the Last Contract. *Isis Plumbing & Heating Company*, 138 NLRB 716, and *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 397 F.2d 29 (C.A. 5).

Having found that Respondent denied seniority rights and privileges, dealing with priority in employment in its restoring or reducing its work force, to 40 strikers who were recalled as temporary employees to their jobs in March or April 1968, to which they were entitled by reason of their employment prior to the strike, I shall recommend that they be given these seniority rights and privileges effective the first day they began work after recall.

I shall also recommend that Respondent, upon request, make available to the Board or its agents for inspection and copying or reproduction, all books and records necessary or helpful in determining the identity of the employees to whom vacation pay is due, as herein provided, and in computing the amounts thereof, and in determining the identity of the employees to whom the aforesaid seniority rights and privileges are to be accorded.

Upon the basis of the foregoing findings of fact, and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent Duncan Foundry and Machine Works, Inc., is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent discriminated against employees in violation of Sections 8(a)(1) and (3) of the Act by withholding from striking employees who were on strike during the entire period from January 29, 1967, to January 31, 1968, or ceased striking during the period but did not return to work by September 13, 1967, vacation pay for 1967, based on hours worked from May 1, 1966, to January 29, 1967.

3. Respondent discriminated against employees in violation of Section 8(a)(1) and (3) of the Act by denying to 40 striking employees it recalled to their jobs as temporary employees in March or April 1968, after termination of the strike on January 31, 1968, seniority rights and privileges dealing with priority in employment in its restoring or reducing its work force to which these employees were entitled by reason of tenure as employees prior to January 29, 1967.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, Trial Examiner hereby issues the following:

RECOMMENDED ORDER

1. Respondent Duncan Foundry and Machine Works, Inc., its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Discouraging membership in United Steelworkers of America, AFL-CIO, or any other labor organization, by discriminatorily withholding vacation pay or other vacation benefits from striking employees who do not return to work prior to the termination of a strike or prior to the time Respondent, in a representation petition it files during the strike, contends they are no longer employees.

2. Discouraging membership in United Steelworkers of America, AFL-CIO, or any other labor organization, by discriminatorily denying to striking employees it recalls after termination of a strike seniority rights and privileges relating to priority of employment when it restores or reduces its work force that these strikers earn prior to the time they go on strike.

3. Engaging in like or related conduct that interferes with, restrains or coerces employees in rights they have to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or by discriminating against them in regard to hire or tenure of employment or any term or condition of employment.

B. Take the following action which will effectuate the purposes of the Act:

1. Pay to each of the striking employees who remained on strike from January 29, 1967, to January 31, 1968, or who returned to work prior to January 31, 1968, but not before September 13, 1967, vacation pay for 1967, withheld from him, in an amount equal to 2 weeks' pay plus any supplemental amount to which he is entitled under the formula used by Respondent to compute the supplemental amounts it paid the employees who received vacation pay for 1967, plus interest at 6 percent from the first date the employees given vacation pay for 1967, were paid 2 weeks' pay for the 2 weeks in August 1967, they did not work supplemented by amounts computed under article XI of the Last Contract as provided in the above section called "The Remedy"; and

2. Restore to the striking employees recalled as temporary employees in March or April 1967, after the termination of the strike from January 29, 1967, to January 31, 1968, effective the first day of their employment after recall, the seniority rights and privileges relating to priority in employment on the restoring or reducing of work force, which Respondent has denied these employees.

3. Preserve, and upon request, make available to the Board or its agents, for examination and copying, or reproduction, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and material to Respondent Employer's compliance with the provisions of this Order.

4. Post at its plant in Alton, Illinois, copies of the attached notice marked "Appendix."[31] Copies of said

[31] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the

notice, on forms provided by the Regional Director for Region 14, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

5. Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Recommended Order, what steps the Respondent has taken to comply herewith.[32]

IT IS FURTHER RECOMMENDED that unless on or before 20 days from the date of the receipt of this Trial Examiner's Decision and Recommended Order Respondent notifies the Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an Order requiring the Respondent to take the action aforesaid.

Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of the United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and order."

[32]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommended order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as Amended, we hereby notify our employees that:

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO, or any other labor organization, by discriminatorily withholding vacation pay or other vacation benefits from striking employees who do not return to work prior to the termination of the strike or prior to the time Respondent, in a representation proceeding, contends they are no longer employees.

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO, or any other labor organization, by discriminatorily denying to striking employees recalled after termination of a strike the seniority rights and privileges relating to priority of employment when we restore or reduce our work force that these strikers earn prior to the time they go on strike.

WE WILL pay to striking employees the vacation pay for 1967 that we withheld from them, and restore to striking employees recalled to their jobs after the termination of the strike on January 31, 1968, the seniority rights and privileges we denied them.

All our employees are free to become or refrain from becoming, members of United Steelworkers of America, AFL-CIO, or any other labor organization.

DUNCAN FOUNDRY AND MACHINE WORKS, INC.
(Employer)

Dated By
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions they may communicate directly with the Board's Regional Office, 1040 Boatmen's Bank Building, 314 North Broadway, St. Louis, Missouri 63102, Telephone 662-4167.